

**U.S. Department of Labor**

Board of Alien Labor Certification Appeals  
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**Issue Date: 08 November 2005**

**BALCA Case No.: 2004-INA-00357**  
**ETA Case No.: P2003-NY-02498862**

*In the Matter of:*

**SHEARS REALTY, INC.,**  
*Employer,*

*on behalf of*

**ZSOLT CSEZSI, JR.,**  
*Alien.*

Appearance: Jed David Philwin, Esquire.  
110 Wall Street, Floor 21  
New York, New York 10005  
*For the Employer and Alien*

Certifying Officer: Dolores DeHaan  
New York, New York

Before: **Burke, Chapman, and Vittone**  
Administrative Law Judges

**DECISION AND ORDER**

**PER CURIAM.** This case arises from the Employer's request for review of the denial by a U.S. Department of Labor Certifying Officer ("CO") of its application for alien labor certification. Permanent alien labor certification is governed by section 212 (a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A), and Title 20, Part 656 of the Code of Federal Regulations.<sup>1</sup> We base our decision on the record upon which the CO denied certification and

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<sup>1</sup> This application was filed prior to the effective date of the "PERM" regulations. See 69 Fed. Reg. 77326 (Dec. 27, 2005). Accordingly, the regulatory citations in this decision are to the 2004 edition of the Code of Federal

the Employer's request for review, as contained in the appeal file ("AF") and any written arguments. 20 C.F.R. § 656.27(c).

### **STATEMENT OF THE CASE**

On April 27, 2001, the Employer filed a labor certification application ("LCA") on behalf of the Alien to fill the position of Carpenter. (AF 45). The only job requirement listed called for two years of experience in the job offered. (AF 45). The job to be performed was described as building, installing, and repairing cabinets, benches, floors, and doors. (AF 45).

By cover letter dated April 26, 2001, the Employer requested Reduction in Recruitment ("RIR") processing. (AF 5). On March 18, 2004, the CO issued a Notice of Findings ("NOF") proposing to deny the Employer's application and request for RIR pursuant to 20 C.F.R. § 656.20(c)(8), which requires the employer to document that the "job opportunity has been and is clearly open to any qualified U.S. worker." (AF 35). In the NOF, the CO stated that a search using the business name and then the business address provided in the LCA failed to show any listing for the Employer's business. (AF 35). In response, the CO directed the Employer to document the existence of the business offering the position by submitting a copy of the articles of incorporation for the business, a current lease with rent receipts for the last six months, telephone bills for the last six months for the number listed on the labor certification application, an explanation for why that telephone number was not found in phone directories, federal tax returns for years 2000 through 2002 for the business, the job title and daily schedule of each employee, and copies of W-2 forms for the years 2001 through 2003 for each employee working for the business during that period. (AF 35). In addition, the CO required additional documentation showing that the offered job existed prior to the filing of the LCA; that the Employer's wage offer equals or exceeds the prevailing wage, as required by 20 C.F.R. § 656.20(c)(2); that the Employer document the results of its recruitment efforts, including both formal rejections and other less formal actions, as required by 20 C.F.R. § 656.21(b)(1); that the posting of notice of the job opening at the Employer's place of business be documented, as required by 20 C.F.R. § 656.20(g); and that the Employer document the requirement of two years

of experience in the job offered as the minimum necessary for the performance of the job, as required by 20 C.F.R. § 656.20(b)(5), and that the Alien meets those requirements. (AF 35-37).

The Employer's signed rebuttal was dated May 26, 2004. (AF 14). The Employer provided corporate federal income tax returns for 2001 and 2002. In a signed cover letter, the Employer claimed to employ three maintenance persons, one carpenter, one bookkeeper, and one plumber, and noted that cell phones are as common as land lines, apparently to explain its failure to supply recent telephone bills as requested in the NOF. (AF 14). None of the other documentation requested in the NOF was provided.

The CO issued a Final Determination denying labor certification on June 10, 2004. (AF 12). The CO accepted the Employer's rebuttal to several deficiencies, but found that the Employer had failed to document that a *bona fide* offer of permanent employment exists, as is required under 20 C.F.R. § 656.20(c)(8). (AF 13). Although corporate tax returns for 2001 and 2002 were provided, the CO noted that the Employer failed to provide the other requested documentation. (AF 13). The CO concluded that the Employer failed to adequately establish the existence of a viable employer and a *bona fide* job offer, and the CO therefore denied the application. (AF 13).

The Employer submitted a letter of appeal dated July 9, 2004. (AF 1). Along with the letter, the Employer submitted a copy of the second page of its April 2004 bank statement (with no address shown) and a fuel oil bill (showing the address from item 7 of the LCA). (AF 5-6). The Board of Alien Labor Certification Appeals ("Board") docketed the case on September 15, 2004.

## **DISCUSSION**

An employer must show that the job opportunity has been and is open and available to qualified U.S. workers. 20 C.F.R. § 656.20(c)(8). This requirement gives rise to what has been termed the "bona fide job opportunity" test, wherein an employer may be required to provide documentation establishing the nature or status of the position or employer in question. *See Pasadena Typewriter and Adding Machine Co., Inc. and Alirez Rahmaty v. United States Department of Labor*, No. CV 83-5516-AABT, (C.D. Cal. 1987); *Susan & Robert Hermanos*,

2002-INA-256 (Aug. 28, 2003). Certification may be denied on the ground that no *bona fide* job opportunity exists where the employer fails to provide documentation requested by the CO. *Britt's Antique Importers/Exporters*, 1990-INA-276 (Dec. 17, 1990). For example, upon a request by the CO, a petitioner must provide a business license or other documentation to prove the existence of a viable business entity. *Kogan & Moore Architects, Inc.*, 1990-INA-466 (May 10, 1991); *see also Gencorp*, 1987-INA-659 (Jan. 13, 1988) (*en banc*). An employer's failure to produce a relevant and reasonably obtainable document requested by the CO is grounds for denial of certification. *STLO Corporation*, 1990-INA-7 (Sept. 9, 1991); *Aerial Topographic Maps*, 1994-INA-627 (Aug. 15, 1996). The employer bears the burden of proving that a position is permanent and full-time, and certification may be denied if the employer's own evidence fails on that point. *Gerata Systems America, Inc.*, 1988-INA-344 (Dec. 16, 1988) (*en banc*). Evidence submitted after the issuance of the Final Determination, with the request for review, cannot be considered by the Board on appeal. 20 C.F.R. § 656.26(b)(4); *University of Texas at San Antonio*, 1988-INA-71 (May 9, 1988).

In the Final Determination, the CO stated that, apart from the corporate tax returns, none of the documentation requested to show that the advertised position was a *bona fide* job opportunity offered by a viable and established employer had been submitted. (AF 13). The employer offered no adequate explanation for its failure to provide this relevant and easily obtainable documentation. The Employer's corporate tax return for 2002, for example, shows significant amounts entered as salaries and wages, rent, and telephone expense, strongly suggesting the availability of the W-2 forms, rent receipts, and telephone bills requested by the CO. (AF 15, 20). This failure to produce relevant and easily obtainable documentation when requested by the CO is one basis for denying the certification. In addition, the certification may be denied because the documentation that was submitted is insufficient to rebut the CO's concerns about the *bona fide* status of the offered position. We note that the information provided by the Employer in the letter of appeal cannot be considered by the Board on appeal.

As provided at 20 C.F.R. § 656.21(i)(5), the CO should ordinarily return the denied RIR to the state office for full, supervised recruitment. While the Board has endorsed this approach in general, *Compaq Computer Corp.*, 2002-INA-249 (Sept. 3, 2002), the Board also recognizes certain exceptions. In *Beith Aharon*, 2003-INA-300 (Nov. 18, 2004), under facts quite similar to

those in the present case, we affirmed a CO's denial of certification for failure to adequately establish that the offered position was a *bona fide* job opportunity. Furthermore, we stated in *Beith Aharon*:

An employer who is not able to establish that it can offer a *bona fide* job opportunity has presented an application that is so fundamentally flawed that it would serve no purpose to remand the case for regular processing. In such a case, the CO may deny the application outright rather than remand for regular processing, even if the case was presented in a RIR posture.

*Beith Aharon*, 2003-INA-300 (Nov. 18, 2004). The CO had a sufficient basis for concluding that the Employer failed to meet its burden of documenting the existence of a *bona fide* job opportunity offered by a viable employer. Consequently, remanding for additional recruitment in this case would serve no purpose, and we affirm the CO's denial of the application.

### **ORDER**

The CO's denial of labor certification is hereby **AFFIRMED**.

Entered at the direction of the panel by:

**A**

Todd R. Smyth  
Secretary to the Board of  
Alien Labor Certification Appeals

**NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW:** This Decision and Order will become the final decision of the Secretary unless within twenty days from the date of service a party petitions for review by the full Board. Such review is not favored and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk  
Office of Administrative Law Judges  
Board of Alien Labor Certification Appeals  
800 K Street, NW Suite 400  
Washington, DC 20001-8002

Copies of the petition must also be served on other parties and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced pages. Responses, if any, shall be filed within ten days of service of the petition, and shall not exceed five double-spaced pages. Upon the granting of a petition the Board may order briefs.